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IN THE

Supreme Court of the United States

No. 70.

October Term, 1947.

GILES KAVANAGH, Collector of Internal Revenue,
Petitioner,

v.

J. H. NOBLE,
Respondent.

RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI.

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J. H. NOBLE,

Respondent.

MOTION TO DISMISS WRIT OF CERTIORARI.

Now comes J. H. Noble, respondent herein, and moves the Court to dismiss the writ of certiorari heretofore granted and upon the following grounds:

1. The petition does not contain "a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question" as provided in Rule 38, paragraph 2, of the Rules of this Court, in which Rule reference is made on that point to Rule 12, paragraph 1.

2. The petition does not contain a statement required by the referred to Rule 12, paragraph 1, providing:

> "The statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on . . ."

3. The petition does not show as required by Rule 38, paragraph 2, "The reasons relied on for the allowance of the writ."

(a) Under the heading "Reasons for Granting the Writ" the petitioner states:

> "This is a companion case to *Jones v. Liberty Glass Co.*, in which a petition for certiorari is being filed simultaneously with the petition in the instant case. The statutory period of limitations involved in this case is the same as that in issue in the *Liberty Glass* case. All of the reasons for granting the writ relied upon in our petition in the latter case are equally applicable here" (Pet. 8).

(b) Respondent's counsel were not served with copy of the petition in the *Liberty Glass Company* case (No. 71, October Term, 1947) and had no knowledge of the grounds upon which the petition was based until after their brief opposing the grant of the writ had been prepared, though by wiring for it a copy of the petition in the *Liberty Glass Company* case was obtained just before filing the brief.

(c) Respondent's counsel were not able to obtain a copy of the Transcript of Record in the referred to *Liberty Glass Company* case until after the petition for the writ of certiorari had been granted in the instant case.

(d) Upon examining the Transcript of Record in that case it is seen that there is no point of similarity between the facts in the *Liberty Glass Company* case and those in the instant case, nor any likeness in any respect except that both cases do involve the statute of limitations.

(e) The overpayment complained of in the *Liberty Glass Company* case was the result of the failure of the revenue agent "to allow any credit for the money used to retire

indebtedness" (R. 2, 7, 17 (7)). It is clear from the record that this was a mere inadvertence and overlooked by the Revenue agent and by the taxpayer until subsequently "discovered" (R. 2, 15 (2)).

(f) The collection complained of in the instant case was no inadvertence, it was protested (R. 5 (10)), and the collection was made as the result of a Regulation of the Commissioner approved by the Secretary of the Treasury (Reg. 86, Art. 117-5) seeking to impose a tax on this taxable unit, husband and wife, not imposed by any law, reading so far as material as follows:

> "In the application of Section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers" (R. 8 Ex. "A").

(g) In the instant case respondent and his wife filed a joint return in which the losses and gains from sales of capital assets by respondent and by his wife were reported together resulting in a net loss in excess of $2,000.00 (R. 17 (5)) which the Commissioner, under said Regulation, refused to allow to be done, and collected from the respondent the sum here involved, (R. 26 (17)) as for tax on these sales of capital assets from which the taxable unit suffered a loss.

(h) In the *Liberty Glass Company* case one of the "reasons for granting the writ" is the statement: "The importance of the question presented, involving, as it does, the great mass of claims for refund of income taxes, is manifest" (Pet. 7 (1)).

In all the many thousands of cases involving claims for refund of income taxes, from the beginning of income tax litigation to the present time, there have been only four in which there has been presented the question as to the limitation applicable to the refund of a collection as for an income tax but not imposed by any statute.

WHEREFORE, Respondent prays for the grant of this moiton to dismiss the Writ of Certiorari in this case.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI.

This motion is in the interest of the orderly processes of this Court whose docket it is believed should not be burdened with inappropriate cases.

The petition contains no grounds for granting the writ except by reference to another case, *Jones v. Liberty Glass Co.* (No. 71, October Term, 1947) as set out in paragraph 3 (a) of this motion.

When it appears from the records that the two cases are not the same the petition in this case contains no grounds or reasons for granting the writ.

For convenience these two cases will be referred to as *Liberty Glass Co.* case and *J. H. Noble* case.

Chief Justice Taft considered the same point in *Layne and Bowler Corp. v. Western Well Works, et al.*, 261 U. S. 387, 393, in which the headnote reads:

> "A writ of certiorari, issued to settle a supposed conflict of decision between two circuit courts of appeal concerning the validity and scope of a patent, will be dismissed, as improvidently granted, when later examination proves that such conflict did not exist."

And the opinion concluded:

> "The two decisions not being in conflict there was no ground for our allowing the writ of certiorari to add to an already burdened docket"—and dismissed the writ, citing *Furness, Withy & Co. v. Yang-Tsze Insurance Association*, 242 U. S. 430 and *U. S. v. Rimer*, 220 U. S. 547.

Layne and Bowler Corporation case, *supra*, was cited with approval and writ dismissed in *Erie Railroad Company v. Kirkendall*, 266 U. S. 185, 186.

The two cases are dissimilar in that (1) the issues presented are not alike and (2) the *J. H. Noble* case presents

no "question of general importance" nor does it involve "the great mass of claims for refund of income taxes" as stated on page 7 of the petition in the *Liberty Glass Company* case.

(1) The Issues in the Two Cases Are Not Alike.

The *Liberty Glass Company* case is an income tax case. The *J. H. Noble* case is not.

In the *Liberty Glass Company* case there was a mere factual omission to give the taxpayer an allowable credit, a usual ground for claims for refund. There was no regulation denying such credit, but only an excessive collection of a lawfully imposed tax.

The *J. H. Noble* case involves a "sum . . . wrongfully collected" (Code Sec. 3313), called by the Commissioner an income tax, but not a tax authorized by the Sixteenth Amendment, nor any tax imposed by any law. It was a collection exacted from a taxable unit—husband and wife—on sales of capital assets that resulted in a loss, which this Court held could not be done, and voided the regulation (Reg. 86, Art. 117-5, *supra*) under which the collection was made. *Helvering v. Janney, et al.*, 311 U. S. 189.

In the *J. H. Noble* case no income tax was owing. Return had been filed and all income tax for the year had been paid (R. 23 (9)). It was not a tax of any kind. The Commissioner merely called it an income tax. It might better have been called a loss tax or some excise tax.

(2) The J. H. Noble Case Involves No Question of General Importance.

So far as careful study discloses during more than thirty years of income tax litigation involving many thousands of suits for refunds of income taxes, or of collections purported to be as for income taxes, barring what is now pending in this Court there have been only four cases which have brought in question the period of limitation appli-

cable to the refund of a sum collected as for an income tax but which had not been imposed by any law.

1. **Huntley v. Southern Oregon Sales, Inc.**, 102 F. (2nd) 538 (C. C. A. 9th). With reference to this case the Solicitor General announced that no petition for certiorari would be filed. (Prentice-Hall Federal Tax Service 1939, Sec. 4.35.)

2. **Olsen v. United States** 32 Fed. Supp. 276 (D. C. S. D. California). No appeal was taken from this case.

3. **United States v. Lederer Terminal Warehouse Co.**, 139 F. (2nd) 679 (C. C. A. 6th). In affirming the decision of the District Court in that case the Court said:

> "The conclusion which has been reached is in consonance with *Huntley v. Southern Oregon Sales, Inc.*, 9 Cir. 102 F. (2nd) 538, wherein Judge Haney detailed legislative history pertinent here. See also *Olsen v. United States*, D. C., 32 F. Supp. 276. The fact that in the cited cases, *no tax whatever* was due from the taxpayer while in the instant case, *no additional tax* was due is deemed immaterial." (Emphasis the court's.)

No petition for certiorari was filed in this case.

4. **Sbarboro v. United States, 1947 P-H Tax Service 72485.** In this case decided May 29 1947, income tax had been collected on income on which the Congress had imposed no tax. The court discussed the contentions of the Commissioner as now made in the *Liberty Glass Co.* case, and held that the four years limitation applied.

The above list of four cases, in none of which was there disagreement, exhausts the prior cases involving funds of illegally collected sums as for income taxes but not imposed by any law, so that the matter would hardly seem to be "a question of general importance" or to involve "the great mass of claims for refund of income taxes" as stated on page 7 of the petition for the writ in the *Liberty Glass Company* case.

Based on the available statistics from the Department of Justice it has been estimated that suits against the United States and against Collectors for refunds of income taxes average approximately five hundred cases a year, and yet there have been only four prior reported cases involving the period of limitation applicable to refunds of illegal collections made as for income tax but not imposed by any law.

Respondent's counsel can have no information as to the many cases similar to the *Liberty Glass Co.* case now pending in the district courts mentioned in the petition in that case (P. 8), but if all of them are like the *Liberty Glass Co.* case as stated in that petition, they can have no relevancy to the wholly different situation presented in the instant case.

This Court considered a like situation in *Southern Power Company v. North Carolina Public Service Co., et al.*, 263 U. S. 508, in which the head note reads:

> "A writ of certiorari, granted under the impression, induced by the petition, that a question of public importance is involved, will be dismissed when the argument reveals that the impression was erroneous."

Similarly in *United States v. Rimer*, 220 U. S. 547, it was stated in the head note:

> "When certiorari is granted on the basis that the decision below involved principles of far-reaching effect and overthrows settled administrative construction, and it appears on the argument that the decision does not deal with such principles or have such effect, and that the action of the court below was not, either as to its character or importance, within the scope of the grant of power given by the Judiciary Act of 1891 to review by certiorari, the writ will be dismissed."

To the same effect is *Furness, Withy & Company, Ltd. v. Yang-Tsze Insurance Association, et al.*, 242 U. S. 430, where it is stated:

"Petition for writs of certiorari are at the risk of the parties making them, and whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may upon motion by a party or *ex mero motu* dismiss the writ."

"Such petitions should be carefully prepared, contain appropriate references to the record, and present with studied accuracy, brevity and clearness whatever is essential to ready and adequate understanding of points requiring the court's attention."

Nor is there any administrative difficulty to be resolved. The Bureau has no trouble in drawing the distinction between "legally collected taxes" and "illegally assessed and collected taxes" and provides in Mimeograph 3958 (C. B. XI-2, 23) and Mimeograph 4564 (C. B. 1397-1, 93) that refunds of taxes "legally collected" shall be treated as income for the taxable year in which the refund is made, while a different treatment is provided in the case of a refund of "taxes illegally assessed and collected". (1947 Prentice-Hall Tax Service, 7370.)

The writ having been issued under the misapprehension, induced by the petition, that the issue in this case is the same as that in the *Liberty Glass Company* case, and that it involves a question of general importance affecting the great mass of claims for refunds of income taxes, it would seem proper that the writ be dismissed.

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